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Syndicate Exchange Corporation, Adventure Partners, LTD. v. Crusher Rental & Sales, Inc., Larry Eilers : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SYNDICATE EXCHANGE CORPORATION, a Texas corporation, and ADVENTURE PARTNERS, LTD., a Texas limited partnership, Plaintiffs/Appellee, v. CRUSHER RENTAL & SALES, INC., a Utah corporation, and LARRY EILERS, Defendant/Appellant.	Case No. 20080298-CA

On appeal from an order and final judgment of the Fifth District Court for Iron County
The Honorable J. Phillip Eves and G. Michael Westfall, District Court Judges

REPLY BRIEF OF APPELLANT CRUSHER RENTAL & SALES, INC.

Bryan J. Pattison (8766)
Durham Jones & Pinegar, P.C.
192 East 200 North, Third Floor
St. George, Utah 84770
(435) 674-0400

Thomas J. Burns (8918)
Durham Jones & Pinegar, P.C.
111 East Broadway, Suite 900
Salt Lake City, Utah 84111

Cyndi W. Gilbert (4513)
991 S. Toquer Blvd.
P.O. Box 190
Toquerville, Utah 84774
Attorneys for Appellant

Jesse C. Trentadue
Noah M. Hoagland
Suitter Axland PLLC
8 East Broadway, Suite 200
P. O. Box 510506
Salt Lake City, UT 84151-0506
Attorneys for Appellee

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Durham Jones & Pinegar, P.C.
192 East 200 North, Third Floor
St. George, Utah 84770
(435) 674-0400

Thomas J. Burns (8918)
Durham Jones & Pinegar, P.C.
111 East Broadway, Suite 900
Salt Lake City, Utah 84111

Cyndi W. Gilbert (4513)
991 S. Toquer Blvd.
P.O. Box 190
Toquerville, Utah 84774
Attorneys for Appellant

Jesse C. Trentadue
Noah M. Hoagland
Suitter Axland PLLC
8 East Broadway, Suite 200
P. O. Box 510506
Salt Lake City, UT 84151-0506
Attorneys for Appellee

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ARGUMENT

I. THE JUDGMENT AGAINST BUTTONWILLOW COMPACTION MATERIALS SHOULD HAVE BEEN APPLIED AGAINST SYNDICATE

Although Syndicate goes to great lengths to distance itself from Buttonwillow Compaction Materials ("BCM") and the default judgment entered against BCM, Syndicate's efforts require not only reading out material provisions of Syndicate's agreement with BCM but also the resort to inapplicable authority and to doctrines that have not been accepted in either California or Utah.

A. THROUGH ITS CONTRACT WITH BCM, SYNDICATE ASSUMED BCM'S ROLE, LIABILITY, AND JUDGMENT

Syndicate has attempted to distance itself from the duties that it assumed under the provisions of its agreement with BCM and to describe itself, and its duties, in the simplest and least burdensome terms. However, the plain language of the agreement strongly contradicts Syndicate's position, and advocates, almost without question, for the adoption of the position Crusher has put forward.

Under Utah, and California, law, contracts must be enforced according to their plain language, see Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc., 2004 UT 54, ¶ 10, 94 P.3d 292; Schaffter v. Creative Cap. Leasing Group, LLC, 166 Cal. App. 4th 745, 751 (Cal. Ct. App. 2008) ("'We infer the parties' intent from the written provisions of the contract [which are] "to be understood in their ordinary and popular sense, rather than according to their strict legal meaning."'"), and under the plain language of the Assignment of Cause of Action (the

"Contract"), Syndicate became not only BCM's indemnitor, but also its surety, insurer, and, in effect, guarantor.

Only two provisions of the Contract are material to the instant appeal. First: The Assignment of the Claims provision. (R. 1134.) Under this provision, BCM agreed to assign to Syndicate all of its rights, interests, and title to any claims that BCM might otherwise have had against Crusher. (Id.) In turn, Syndicate assumed full responsibility for all of BCM's responsibilities pursuant to the dispute with Crusher Syndicate *as if Crusher actually were BCM.* Second: The Indemnification provision. (Id.) Under this provision, Syndicate agreed not only to generally indemnify BCM from any of Crusher's possible claims against it, but also to hold BCM harmless, to defend BCM from these claims, and to assume total responsibility for all costs or losses that BCM might suffer or incur as a result of any litigation between BCM and Crusher. (R. 1134.) Assuming, as this court must, that the parties intended to give life to all of the provisions of the Contract, and that the parties intended all of the provisions of the Contract to have meaning, Syndicate's assertion that the Contract is a mere indemnification agreement is untenable. Syndicate agreed to far more that simple indemnity in both the first and second material provisions of the Contract, and although one could read each of these provisions as implying indemnification, such a reading would require reading out of the contract several provisions that the parties clearly intended to adopt, and such an interpretation would be contrary to accepted

authority on this issue. See Fairbourn Commercial, 2004 UT 54, ¶ 10 (noting that all provisions of a contract are to be given effect, and none are to be ignored).

Applying this authority to the provisions of the Contract, the inevitable conclusion is that Syndicate bargained to become far more than a simple indemnitor. Rather, Syndicate bargained to assume BCM's position in every way concerning the dispute with Crusher. As asserted by Syndicate itself, Syndicate bargained become the indemnitor. But it also agreed to guarantee that no harm would come to BCM, and it agreed to assume the role of defender and insurer of BCM, eliminating the need for BCM to respond to any complaint filed by Crusher, and eliminating the need for BCM to retain legal services, or to incur any costs related to a potential legal action. In fact, pursuant to the Contract, Syndicate agreed not only to indemnify and defend BCM against any possible legal action or harm, it insured BCM that no harm would come to it, and it guaranteed that any costs incurred, and any responsibility imposed, would be borne solely by Syndicate. Consequently, contrary to the oversimplified interpretation urged by Syndicate, under the terms of the Contract, Syndicate assumed all of the rights, responsibilities, and duties that otherwise would have inured to BCM in this matter, and in doing so, Syndicate not only assumed the role of indemnitor, surety, insurer, and guarantor for BCM, but it in effect assumed BCM's position in the dispute and accepted responsibility for the judgment rendered by the trial court.

B. SYNDICATE'S ARGUMENT RELIES ON INAPPLICABLE AUTHORITY

The applicable authority cited by Crusher is contrary to the trial court's refusal to apply the BCM judgment against Syndicate and supports Crusher's position on this issue. Moreover, contrary to the assertions of Syndicate, this authority advocates for the reversal of the trial court's refusal to apply the judgment against Syndicate in this matter.

First, in attempting to evade the responsibility that it agreed to assume, Syndicate asserts that Crusher's position is barred by the Common or Joint Defense Doctrine. See, e.g. Sutter v. Payne, 989 S.E.2d 887 (Ark. 1999); Southerland v. Gross, 772 p.2d 1287 (Nev. 1989). However, Syndicate's brief constitutes the first and only mention of this doctrine in this matter, precluding its use as support for the trial court's decision. See generally Bailey v. Bayles, 2002 UT 58, 52 P.3d 1158 (limiting the application of the affirm on any grounds doctrine). Further, a review of both Utah and California authorities reveals that neither jurisdiction ahs adopted the doctrine, although logic would dictate that the opportunity has been presented in both jurisdictions. Additionally, to the extent that the joint defense doctrine has acquired any standing within either California or Utah, it is simply inapplicable to the instant case.

Under the common defense doctrine, the defense set forth by one defendant may be extended to a *joint defendant* "'where the defense interposed by [the] answering defendant is not personal to himself, . . .but common to all.'" *Ex rel*

Everett, 544 P.2d 1043, 1045 (Ore. 1976) (citation omitted). Here, Crusher's effort to extend liability to Syndicate and its principal was, as recognized by the trial court, an overextension. Simply put, Crusher had never entered into any relationship with Syndicate or its principal, and its efforts to extend liability to them were therefore unsuccessful. In contrast, Crusher's sole relationship was with BCM, and only BCM and Crusher had discussed and contracted for crushing equipment. As a result, the defenses interposed by Syndicate and its principal were personal to them, and not common to both themselves and BCM. Consequently, Syndicate's resort to the joint defense doctrine should be soundly rejected.

Similarly, Syndicate's efforts to rely upon foreign authority to reduce the scope of responsibility that it assumed as BCM's surety are also inapplicable. In this effort, Syndicate cites the court to several cases, including National Technical Systems v. Superior Court of Los Angeles, 97 Cal. App. 4th 415 (Cal. Ct. App. 2002) and All Bay Mill & Lumber Co., Inc. v. Surety Co. of the Pacific, 208 Cal. App. 3d 11 (Cal. Ct. App. 1989). However, contrary to Syndicate's assertion, this authority does not support Syndicate. For instance, in All Bay, the court was asked to interpret the scope of a sureties' responsibility pursuant to a statute that defines the responsibilities of a surety to a contractor. See 97 Cal. App. 4th at 15. In response, the All Bay court held that the sureties' responsibility were limited to the terms articulated within the plain language of the statute being analyzed. See id. In contrast, here, Syndicate's responsibility were assumed pursuant not to

statutory authority, nor are they controlled by any applicable statute, rather, Syndicate's responsibilities arise from the Contract, rendering All Bay easily distinguishable.

In National Technical, the court reviewed whether a surety was bound by a judgment entered against the principle in an action in which the surety did not participate and had no opportunity to participate. See 97 Cal. App. 4th at 417. The court found, relying on All Bay, that under the circumstances the default judgment was not applicable against the surety. Id. at 422. However, the court then carefully noted that its reasoning was predicated upon the absence of notice: Stating that where notice is provided "the surety may move to intervene in the action, or it may simply elect to await the final judgment in the action and the [principal's] enforcement of the liability on the bond," actions not available to the surety in the absence of notice. Id. As applied to the instant case, two elements distinguish National Technical from the instant case. First, here, unlike in National Technical, no bond was asked for or issued; rather, Syndicate assumed BCM's role and responsibilities as a result of its decision to enter into the Contract. Second, and to Crusher's clear advantage, unlike the surety in National Technical, Syndicate had notice of the action that Crusher filed against BCM and chose to sit idly by. Syndicate allowed default to issue and allowed the default judgment to be entered, but only after having been fully apprised of Crusher's efforts against BCM. Thus, to the extent that National Technical is material to this case, it supports Crusher's argument.

Finally, Syndicate asserts that its success at trial precludes it being bound by the BCM default judgment. However, the authority cited by Syndicate is unpersuasive, not only because of the language found in more persuasive authority, but also because the doctrine supported by these authorities is predicated upon the inapplicable common defense doctrine. The best example of Syndicate's error in relying on this line of cases is found in Frow v. De La Vaga, 82 U.S. 552 (1872).

In Frow, an extremely brief opinion—one-half page in length—the Supreme Court held, pursuant to rules of equity, that it would have been improper for the trial court to enter default judgment against one or more of several defendants, when the claim against the defendants were identical, or apparently identical. Id. at 554. However, the Court did not explain the grounds for its holding, and did not articulate the facts that supported its conclusion. See id. Moreover, at least one Federal Court of Appeal has evaluated Frow in the intervening years and concluded that Frow was issued prior to the adoption of the Federal Rules of Civil Procedure, and that with the adoption of Rule 54 of the Federal Rules of Civil Procedure Frow likely was robbed of any remaining legal force, rendering any reliance upon Frow after the adoption of the federal rules unreasonable. See Int'l Controls Corp. v. Vesco, 535 F.2d 742, 746 n.4 (2nd Cir. 1976). Frow is emblematic of the cases that Syndicate has cited, and as a result, this Court should reject the cases as unpersuasive and not well-grounded.

In contrast, the analysis of Drill South, Inc. v. Int'l Fid. Ins. Co., 234 F.3d 1232 (11th Cir. 2000), provides perhaps the best insight into this issue. In Drill South, when presented with the question of whether a surety was bound by the default judgment entered against its principle, the Eleventh Circuit first determined that "the general rule that has emerged [on this issue is that a surety is bound by any judgment against its principal, default or otherwise, when the surety had full knowledge of the action against the principal and an opportunity to defend." Drill South, 234 F.3d at 1235.[1] "The law requires only that a surety have notice of and an opportunity to defend before it is bound by a judgment against its principal." Id. As Crusher articulated in its opening brief, it is undisputed that Syndicate had notice of Crusher's claims against BCM, and not only an opportunity to defend BCM, but also an obligation to do so. (R. 1134). However, rather than carrying out the duty that it had assumed under the Contract, Syndicate merely ignored Crusher's claims against BCM, failing to file an answer, allowing default to be entered, and allowing a default judgment to issue, all without protest of any kind on any level by Syndicate. Under these circumstances, Syndicate simply has waived its opportunity to assert any defenses regarding Crusher's

[1] Syndicate points out that the Drill South court acknowledged that "[s]ubstantial dispute exist in the law as to whether a default judgment rendered against a principal is binding upon the principal's surety," but Syndicate then fails to note that the dispute is, in essence, hollow, and that the better reasoned authority hold to the general rule that Crusher has asserted throughout these proceedings. Drill South, Inc. v. Int'l Fid. Ins. Co., 234 F.3d 1232, 1235 (11th Cir. 2000). Syndicate also fails to acknowledge that the court in Drill South applied the "general rule" to circumstances largely identical, procedurally, to the instant case, which led that court to hold that a surety with notice and an opportunity to defend its principal was bound by any judgment rendered against the principal. Id. More precisely, the court held that because the surety "had full knowledge of the potential for default judgment . . . possessed numerous opportunities to defend the ultimate judgment" and had ample opportunity to defend the case against he principal on the merits.

claims against BCM, and as BCM indemnitor, surety, insurer, and guarantor, Syndicate is now required to assume full responsibility for the judgment against BCM.

Accordingly, this Court should conclude that the trial court erred in refusing to apply the BCM judgment against Syndicate and reverse the trial court's decision on that issue.

II. THE TRIAL COURT ERRED IN REFUSING TO DISQUALIFY SYNDICATE'S TRIAL COUNSEL

It is undisputed that attorney Scott Lilja ("Lilja"), who is a shareholder within the firm that acted a Syndicate's trial counsel, represented Crusher during the first ten (10) years of Crusher's existence, and that his representation extended not only to the crafting of business documents, but also to representing Crusher in litigation matters during that period. It is further undisputed that Lilja represented Crusher's principal in personal litigation matters, and that Lilja was intimately aware of the nature of Crusher's business practices, and the business and litigation tactics and strategy employed by its principal. However, Syndicate argues that because Lilja played no direct role in Crusher's relationship with BCM, and because Lilja had actually ceased representing Crusher prior to BCM approaching Crusher in 2004, under the Utah Rules of Professional Conduct, the trial court properly rejected Crusher's motion to disqualify Lilja and his firm as trial counsel. In asserting this position, Syndicate appears to misunderstand the thrust of Crusher's argument.

In short, Crusher consistently has maintained, both to the trial court and on appeal, that the nature and extent of Lilja's representation of Crusher was more than sufficient to disqualify him, and by association his firm, from acting as Syndicate's trial counsel. Substantial authority supports Crusher's position, although Crusher concedes that no Utah court has yet addressed this exact issue. The most comprehensive discussion of the authority applicable to this issue is found in Charles W. Wolfram article, Former-Client Conflicts. Charles W. Wolfram, Former-Client Conflicts, 10 Geo. J. Legal Ethics 677, 680 (1997). Wolfram's discussion distills the disqualification standard into one easily applied element: Maintaining client confidentiality. Id. at 687; see also Poly Software International, Inc. v. Yu Su, 880 F. Supp. 1487, 1490 (D. Utah 1995) (stating "ethical rules are generally concerned with the behavior and regulation of the legal profession, and more specifically here with the protection of communications that a reasonable person would assume to be confidential"). Confidentiality is at risk any time that "'representation of the present client will involve the use of information acquired in the course of representing the former client.'" Wolfram, at 685 (quoting Restatement (second) of Conflicts § 213). And Crusher argues that "[o]nce a substantial relationship has been found, a presumption arises that a client has indeed revealed facts to the attorney that require his disqualification." Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985); see also id. (highlighting the panoply of jurisdictions that have adopted the presumptive conflict rule). Crusher further argues that Utah should join the large majority of

jurisdictions that have adopted the presumptive rule, because such a rule "is intended to protect client confidentiality as well as to avoid any appearance of impropriety, [and] '[it] is intended to prevent proof that would be improper to make.'" Id. (quoting In re Corrugated Container Antitrust Litigation, 659 F.2d 1341, 1347 (5th Cir. 1981)).

Syndicate, rather than addressing Crusher's actual argument, attempts to deflect attention from the argument, arguing that Crusher's position is not supported under Utah law. However, Syndicate's crabbed reading of applicable Utah authority fails to acknowledge that Utah courts have recognized the importance of client confidentiality and of avoiding the appearance of impropriety that could embarrass both the courts and the Bar. For instance, in Marguilies v. Upchurch, the Utah Supreme Court noted that relatively few opinions related to the Utah Rules of Professional Conduct have been issued, but stated that "A lawyer should avoid even the appearance of professional impropriety. The basis of this tenet is that society's perception of the integrity of our legal system may be as important as the reality, since it is the perception that engenders public confidence that justice will be dispensed." 696 P.2d 1195, 1204 (Utah 1985) (quotations and citation omitted). Thus, after reviewing the circumstances of the matter before it, the Marguilies Court determined that the protection of the "integrity of the court system as well as the integrity of the [legal] profession" required the disqualification of trial counsel, even though counsel had not directly represented the defendants who sought the disqualification. Id. at 1205. Further, although not

the product of a Utah Court, the holding of City of El Paso v. Soule may prove most persuasive in this matter. See 6 F. Supp. 2d 616, 624 (W.D. Tex. 1998). In addressing the defendant's motion to disqualify plaintiff's counsel, the Soule court found that plaintiff's counsel had performed business related services for the defendant, and that "[i]t would be patently unfair to allow the same lawyer to represent interests adverse to a former client regarding the same business affairs, especially in light of the theories for recovery in, and the nature of, the underlying suit." Id. at 624. Thus, the court granted the motion to disqualify to avoid the potential unfairness and to protect the integrity of the legal system.

Applying this reasoning to the instant case, it appears that the trial court erred in refusing to disqualify Syndicate's trial counsel. First, it is undisputed that Lilja operated as both business and litigation counsel for Crusher and its principal for almost ten years. (R. 1313 Tr. 23:2-11, 16:18-20.) During that time, Lilja advised Crusher and its principal in business matters necessary to the foundation of the business and to grow the business. (R. 1313 Tr. 19:13-18.) Through this representation, Lilja had access to all of Crusher's business information, its contract formation documents and principal, as well as to the strategic and tactical basis for the decisions that were made by Crusher's officers and principals in operating Crusher. (R. 1313 Tr. 10:1-21, 11:7-21, 12, 24-27.) In essence, Lilja possessed the Crusher "playbook," which provided him, and by association, anyone associated with him, valuable insight into Crusher's operations, activities, and decision making processes. And more importantly to the instant case, Lilja

was central in Crusher's structuring of rental agreements to prevent lessees from tying-up or claiming ownership interests in leased equipment. (R. 1313 Tr. 25:9-14.) As a result, the information available to Lilja through his years of representing Crusher should be presumed to be substantially related to any dispute involving Crusher's leases, rental agreements, or other contracts issued in the course of Crusher's business operations.

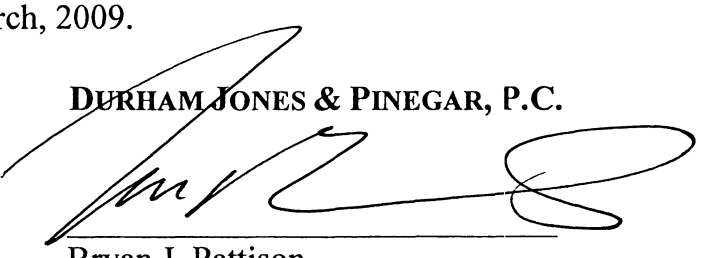
In turn, Lilja's possession of the Crusher playbook, by necessity, suggests that Lilja's involvement in any lawsuit against Crusher carries with it the appearance of impropriety that the Utah Rules of Professional Responsibility seek to avoid. See Marguilies, 696 P.2d at 1205. Lilja is presumed, or should be presumed, to possess confidential information obtained during his representation of Crusher, and he is charged with safekeeping this information. The length and nature of the relationship between Crusher and Lilja gives rise to this presumption, and the trial court erred in permitting any investigation into the nature of this information. Further, the trial court erred in failing to recognize that because of Lilja's presumed possession of potentially damaging confidential information, Lilja owes a duty to Crusher, and that pursuant to that duty, Lilja and his law firm should have been disqualified as Syndicate's trial counsel. The trial court's error, by definition, tainted the entire trial process. Therefore, Crusher now requests that this Court reverse the trial court's denial of the motion to disqualify and remand this matter back to the trial court for a new trial.

CONCLUSION

Accordingly, for all of the aforementioned reasons, this Court should reverse the trial court's judgment and grant judgment for Crusher, or in that alternative, remand this matter for a new trial with instructions that Syndicate is to obtain new counsel.

DATED this 30th day of March, 2009.

DURHAM JONES & PINEGAR, P.C.



Bryan J. Pattison
Thomas J. Burns

Cyndi W. Gilbert (4513)
991 S. Toquer Blvd.
P.O. Box 190
Toquerville, Utah 84774

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2009, I caused two copies of the foregoing **BRIEF OF APPELLANTS** to be mailed in the United States mail, first-class postage prepaid to the following:

Jesse C. Trentadue
Noah M. Hoagland
Suitter Axland PLLC
8 East Broadway, Suite 200
P. O. Box 510506
Salt Lake City, UT 84151-0506
Attorneys for Appellee